In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1095

JAMES LEE STOCKWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner alleges a denial of his constitutional rights because the court of appeals, instead of reducing his sentence outright, remanded the case for resentencing, and because the trial court admitted into evidence the testimony of the two co-conspirators who had pleaded guilty but had not yet been sentenced.

After a second jury trial in the United States District Court for the Central District of California,[1] petitioner was convicted on five counts of having possessed and delivered counterfeit Federal Reserve notes and having conspired to do so, in violation of 18 U.S.C. 472, 473, and 371. He received concurrent prison sentences of which the longest were seven years (Tr. 954-955).[2] The court of appeals

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[1]The first trial of petitioner and co-defendant Jan Benken ended in a mistrial. Prior to the second trial, Benken pleaded guilty to one count of the indictment.

[2]"Tr." refers to the trial transcript.

affirmed the convictions but remanded for resentencing to give the district judge an opportunity to reduce the sentences if he had attached any weight to petitioner's refusal to plead guilty (Pet. App. 2).

The evidence shows that Kenneth Jones, a co-conspirator who testified at trial while awaiting sentence on a state conviction, met with petitioner, Jan Benken, and one "Whitey" Armstrong, who offered to use their influence to "get [him] out of [his] case." The agreed price was Jones's new Cadillac and a set of plates for printing counterfeit $20 bills (Tr. 687-689). Jones turned over his car and was not sentenced on his conviction. At the request of petitioner and Benken he also turned over the plates to Armstrong (Tr. 690-695, 697). About a month later, petitioner called Jones to say that a printer was needed (Tr. 701). After petitioner, Benken, and Armstrong demanded that he get the printing done, Jones enlisted the help of Gerald Shaw. Together they purchased the necessary equipment and printed a quantity of counterfeit $20 bills, which were delivered to Armstrong (Tr. 703-705, 715-716). Shaw and Jones were arrested as a result of their activities. Both were awaiting sentence at the time of petitioner's trial (Tr. 675, 720).

Bobby Evans, Judith Guilmette, and David Gorwitz were among the unindicted co-conspirators. According to their testimony, each had discussions with petitioner relating to the passing of counterfeit bills. Subsequently, each received counterfeit bills from petitioner and attempted to pass them. All three were arrested. The charges against Evans were dropped, but Guilmette and Gorwitz pleaded guilty and prior to petitioner's trial were sentenced to terms of probation (Tr. 768-779, 785-792, 816-825).

1. It is undisputed that petitioner's seven-year combined sentence is well within the statutory maximum of

fifty years' imprisonment and a $30,000 fine for the various offenses of which he was convicted. Petitioner objects because a sentence of three years was imposed upon co-defendant Benken, who pleaded guilty, and because the trial judge indicated that petitioner might receive a three-year sentence if he were to plead guilty to a single count. He finds no answer to this complaint in the fact that the court of appeals remanded for resentencing.

In sentencing co-defendant Benken, the trial court noted that he would have to serve at least five or six years of three consecutive state sentences before being eligible for parole (Tr. 587). A concurrent sentence of three years was imposed on the federal charge. The court then ascertained from the Assistant United States Attorney that Benken and petitioner were equally involved in the counterfeiting scheme (Tr. 589). He stated that, in the event of a conviction, petitioner could expect a sentence of no less than five years (Tr. 590). In response to a question from counsel, the court ventured that his "offhand reaction" would be to impose a three year sentence upon a plea of guilty to one count (Tr. 591). Petitioner elected a jury trial and was convicted on all five counts.

At the time petitioner was sentenced, the court considered a probation report which recommended a substantial prison term (Tr. 937-938), as well as petitioner's record, which included a recent conviction on nineteen counts of mail fraud (Tr. 938-940, 943-947). The Assistant United States Attorney pointed out also that the probation officer had been unable to obtain satisfactory information concerning the nature of petitioner's current employment (Tr. 949, 951). Determining that petitioner's record indicated no evidence that he had reformed, the court sentenced him to seven years' imprisonment (Tr. 953, 955).

The decision in *United States* v. *Wiley*, 278 F. 2d 500 (C.A. 7), on which petitioner relies, is inapposite. There, the defendant, who was only a minor participant in the crime, received a sentence much greater than those imposed on more culpable co-defendants who pleaded guilty, and was denied probation because of the judge's policy not to consider probation for one who stood trial. Here, in contrast, petitioner was an equal participant in the scheme and was convicted on five separate counts, while his co-defendant was convicted on only one. This alone would warrant a more severe sentence. In addition, however, the court considered other factors, including petitioner's prior record and unfavorable probation report, not available to him during the pre-conviction conference at which he suggested his "off-hand" reaction as to possible sentences. See *United States* v. *Levine*, 372 F. 2d 70 (C.A. 7), certiorari denied, 388 U.S. 916. See also *Gollaher* v. *United States*, 419 F. 2d 520, 530 (C.A. 9), certiorari denied, 396 U.S. 960. In any event, the question of the proper sentence has been re-opened by the court of appeals which has remanded to the district court for resentencing under clear instructions precluding consideration of petitioner's determinition to stand on his right to a jury trial.

In challenging the remedy fashioned by the court below, petitioner asserts that his sentence should be reduced by four years or, alternatively, that the case ought to be remanded to a different judge for resentence. First, we note that to remove four years from petitioner's sentence would result in the same sentence for conviction on *five* counts that the trial court tentatively suggested for conviction on *one* count. We submit that this would constitute undue interference with the discretion of the sentencing court. Second, petitioner's claim that the sentencing judge has become "personally involved" in the dis-

position of this case is wholly without merit. The record reveals no suggestion that the personal feelings of the trial judge have clouded his exercise of discretion or that he will prove unable on remand to resentence petitioner dispassionately.

2. Petitioner also contends that the government should not have been permitted to introduce the testimony of co-conspirators Shaw and Jones, who at the time of petitioner's trial were still awaiting sentence after several postponements. In petitioner's view, this practice induces witnesses to perjure themselves in hopes of leniency. Petitioner's contention, however, has been raised a number of times in comparable cases and has been uniformly rejected as bearing only on the weight of a witness' testimony, not its admissibility. *United States* v. *Insana*, 423 F. 2d 1165, 1168 (C.A. 2), certiorari denied, 400 U.S. 841; *United States* v. *Boswell*, 372 F. 2d 781, 784 (C.A. 4), certiorari denied *sub nom. Hellams* v. *United States*, 387 U.S. 919; *United States* v. *Vida*, 370 F. 2d 759, 767 (C.A. 6), certiorari denied, 387 U.S. 910; *Lemons* v. *United States*, 339 F. 2d 761 (C.A. 9), certiorari denied, 380 U.S. 985. See also *Lisenba* v. *California*, 314 U.S. 219, 227; *Hoffa* v. *United States*, 385 U.S. 293. Here, petitioner raised no objection at trial to the admission of the testimony of Shaw and Jones. But counsel was permitted considerable latitude on cross-examination to develop possible motives for testimony favorable to the government.[3]

[3]The fact that Shaw and Jones were awaiting sentencing after several postponements was specifically brought to the jury's attention (Tr. 682-684, 722). Thus, this case is clearly distinguishable from *Napue* v. *Illinois*, 360 U.S. 264, relied upon by petitioner, in which evidence relating to the credibility of a witness was concealed from the jury. It was precisely because of this concealment that the trial was held to have been tainted. Here, in contrast, the witnesses' possible motive for cooperating with the prosecution was fully explored before the jury.

Of course, the relevant consideration for the jury is whether the witness believes his testimony may result in a reduced sentence. Whether or not he in fact does subsequently receive such a sentence has no bearing on the credibility of his testimony.

In addition, the court carefully instructed the jury in regard to the weight of accomplice testimony and the factors affecting the credibility of witnesses (Tr. 897, 902-903); petitioner offered no objection to the charge (Tr. 915-917).

We note finally that the cases of three other co-conspirators—Evans, Guilmette and Gorwitz—were disposed of prior to the time they testified against petitioner, and their combined testimony was sufficient to support a conviction on all five counts, even disregarding the testimony of Shaw and Jones.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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